Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-717

JACK FRISTOE

Petitioner,

vs.

REYNOLDS METALS COMPANY, a California corporation: PRINTING SPECIALITIES AND PAPER PRODUCTS UNION, DISTRICT COUNCIL NO. 2, Local Union No. 708, an unincorporated association; INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS UNION, AFL-CIO, an unincorporated association,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner

vs.

REYNOLDS METALS COMPANY,
et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Jack Fristoe, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit filed August 8, 1979

REPORT OF THE COURTS BELOW

The memorandum of opinion of the United State Court of Appeals for the Ninth Circuit is unreported but is set forth herein; Appendix A. The memorandum of the decision of the United States District Court for the Central District of California is unreported but is set forth herein; Appendix B.

JURISDICTION

The jurisdiction of this court is invoked under TITLE 28 USC 1254 (1), 2101 (C). The decision of the United States Court of Appeals for the Ninth Circuit is unreported but was entered August 8, 1979.

ISSUES PRESENTED FOR REVIEW

I. Was the removal of this case from State Court to Federal Court Proper?

II. Were the respondents defendants entitled to Summary Judgment as a matter of law?

III. Did the trial court deny petitioner due process of law by rendering summary judgment against him and for all respondents without a complete record before it?

IV. Is there a conflict of opinion between the Ninth Circuit Court of Appeals and the Fourth Circuit Court of Appeals?

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Ninth Circuit did not address itself to an important decision out of the Fourth Circuit, Griffin vs INT Union 469 F 2nd, 181,

> Wherein a union breaches its duty of fair representation to an employee when it fails to press a grievance to arbitration when an employee is engaged

in an off duty fight with a supervisor.

Your petitioner has proved that the union breached its duty of fair representation to him and should be excused from exhausting any internal remedies. Vaca vs Sipes 386 U.S. 171 87 S Ct 910.

Your petitioner is being compelled to comform to a union appeals procedure that was not in force at the time of his discharge. Petitioner was discharged from his employment on July 15, 1973 and this constitution was amended in October of 1973.

Your petitioner is being compelled to use the appeal procedure of the International and this procedure has never been proven.

The appeals procedure in question is not adequate to compensate your petitioner for what

he is sueing for.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT V states in part:.....nor be deprived of Life, Liberty or Property, without due process of Law,.....

USC. TITLE 28 1446 (b)

USC. TITLE 28 1447

USC. TITLE 29 185 (a)

USC. TITLE 28 56 FR CIV P

STATEMENT OF THE CASE

This case arising out of TITLE 29 USC. 185(a) wrongful discharge and breach of union duty of fair representation was originally brought in Superior Court State of California on August 26, 1974 and one being of concurrent jurisdiction with Federal Courts.

Renolds removed the case from Superior

Court and after over three years in Federal District Court, summary judgment was issued pursuant to Rule 56 of FR CIV P to all respondents defendants. (Appendix B)

A timely appeal was taken to the Ninth Circuit Court of Appeals and on August 8, 1979 a decision was rendered by that court (Appendix A) against petitioner Fristoe in favor of respondents defendants and it is from this decision that petitioner Fristoe, petitions this court for a Writ of Cetiorari to review the decision of the Ninth Circuit.

STATEMENT OF FACTS

Fristoe was employed by Reynolds Metals Co. on or about November 7, 1970 at Torrance, California. Later became a member of respondent's unions.

Fristoe worked for Reynolds Metals Co.

with a good record until July 15, 1973 whereas he was discharged for fighting with a supervisor off company property and after working hours.

Reynolds contending the discharge was due to an on plant company related incident notwithstanding the fact that the supervisor came into the establishment where the altercation took place a full half hour after Fristoe arrived.

The union pursued the grievance through three steps and failed to proceed to the fourth step which was arbitration.

The union made little or no investigation into the case failing to inform him of anything including when the business agent made a decision not to arbitrate his case, but took the statements of two witnesses, one a woman who the supervisor had a close personal relationship with and a male companion whom the supervisor had known for

a long period of time and Fristoe contends was biased and warranted the close attention of the union.

Fristoe pursued his collective bargaining agreement as far as he could and was unaware of any appeals procedure in the union constitution.

ARGUMENT

I

WAS THE REMOVAL OF THIS CASE FROM STATE COURT PROPER?

Reynolds was served on August 29, 1974, record on appeal page 1, and it appears that the petition was filed on October 1, 1974 a period of 33 days

> "The petition for removal of a civil action shall be filed within thirty days after the receipt by the defendant ..... 28 USC 1446(b).

However only one defendant (Reynolds) removed and Reynolds did not state in its petition why the other defendants did not join R.A. pg 6.

> "The petitions to remove is fatally defective in that it failed to include any reason for not including "Liberty" and the record discloses no such reason." Heckelman vs Yellow Cab Transit Co. 45 F Supp 984.

Fristoe brought the fact that the union did not join nor did Reynolds cite a reason why to the attention of the District Court on oral hearing on his motion to remand (Reporter Transcript page 8) but on noticing any defect in the petition the District Court could and should have remanded the case to State Court Sua Sponte TITIE 28 USC 1447 (c).

> "District Court would be under duty to examine on its own motion questions whether case removed to it should be remanded to State Court... In re MacNeil

Bros CO. 259 F 2nd 386.

The decision of the Ninth Circuit does not address the issue of a Sua Sponte action of the District Court nor does it mention why Reynold did not say why the other defendants could not be joined (Appendix A).

II

WERE THE RESPONDENTS DEFENDANTS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW?

Summary judgment was granted on September 28, 1977 to all respondents defendants and against petitioner plaintiff by the District Court (appendix B) stating that Fristoe had not exhauste his internal union remedies and had not proved that his union breached its duty of fair representation to him and the Ninth Circuit affirmed.

However Fristoe contends he has proven the union breached its duty to him for several reasons and in so doing should be excused from exhausting further internal remedies. Vaca vs Sipes 386 U.S. 171 87 S Ct 910.

Fristoe had an off duty off plant premises fight with a supervisor and his employment was taken from him as a result of this and in a decision of the Fourth Circuit a union breached its duty to fairly represent an employee if the union does not press to arbitration with a grievance Griffin VS International Unions United Auto 469 F 2nd 181.

There was never any investigation on the part of the union, never any contact made to Fristoe. Fristoe's side was never heard by the business agent for the union but rather he takes the statements of two witnesses that were obviously biased and reports them to be true and a union

as a statutory representative must have good faith and honest dealings in the exercise of its discretion. Hines vs Anchor Motor Freight Co. 96 S Ct 1048 (1976). Fristoe alleged a conspiracy in his complaint and had an affidavit on file to confirm such a conspiracy but said affidavit is missing from the file and if a conspiracy existed it should be enough to show that any further attempt to exhaust internal union remedies would have been an exercise in futility, Fruit and Vegetable Packers and Ware. Local 260 vs Morley 378 F 2nd 738 (9th Cir) and the evidence of a conspiracy should be enough to show a breach of duty of fair representation by a union.

Fristoe pursued the collective bargaining agreement as far as he could and was ignorant of any further union remedies despite the fact that the unions constitution was not in force at the time of Fristoes discharge.

Fristoe alleged there was an agency

effect between the International Union and Local Unions.

III

DID THE TRIAL COURT DENY PETITIONER DUE PROCESS OF LAW BY RENDERING SUMMARY JUDGMENT AGAINST HIM AND FOR ALL RESPONDENTS WITHOUT A COMPLETE RECORD BEFORE IT?

Fristoe had attorneys representing him for the better part of three years and made the appeal to the Ninth Circuit Pro Se as he makes this appeal Pro Se and after filing a notice of appeal bestowing jurisdiction upon the Ninth Circuit he discovered the absence of two depositions from the record.

These depositions would have showed the District Court that the union breached its duty to represent Fristoe and that Reynolds breached the collective bargaining agreement by discharging

Fristoe without cause and in effect Fristoe has been denied due process of law. Bass vs Hoagland 172 F 2nd 205 Certiorari denied 70 S Ct 57; 338 U.S. 816, 94 LED 494. C.J.S. Appeal & Error Vol 4a at page 1116.

The omission of the depositions of George Holihan was more than mere inadvertence and damaged Fristoe. For example, Fristoe had thirty days to invoke the purported union appeals procedure from the time he made his decision not to arbitrate Fristoe's grievance, but when asked when he made such a decision he didnt know, how could Fristoe have known when to appeal, no union representative ever contacted Fristoe?

The exclusion of these depositions from the record prejudiced Fristoe's case and was prevented from presenting his case fully before the District Court and a judgment rendered with only a partial record may be attacked. United

States vs Throckmorton 98 U.S. 61; 25 LEd 93 (1878).

IV

IS THERE A CONFLICT OF OPINIONS BETWEEN THE NINTH CIRCUIT AND THE FOURTH CIRCUIT COURTS OF APPEALS?

It is important to note that the Ninth Circuit Court of Appeals has overlooked the fact that Fristoe was discharged for an off duty off premisses fight with a supervisor and in a decision from the Fourth Circuit a union breaches its duty of fair representation to an employee when it does not press such a grievance to arbitration such as in Fristoe's case. Griffin vs International Union Auto A & L I W 469 F.2d 181.

> "Apparent conflict between decisions which was subject of petition and decision of Courts of Appeals for other Circuits impelled Supreme Court to grant Certiorari." N.L.R.R. vs Metropolitan Life Ins. Co. R.I. 1965 85 S Ct 1061, 380 U.S. 438, 13 L.Ed 2d 951.

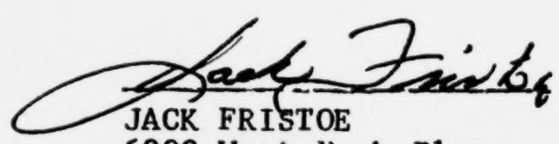
CONCLUSION

It is respectfully submitted that this case presents a serious and important question concerning the right of petitioner to due process by reason of being deprived a complete record on which the District Court ruled on the summary judgment.

This case also presents a serious conflict of opinion between the Ninth and Fourth Circuit Courts of Appeals and should have a decision by Your Honorable Court to establish a Standard.

By reason of the foregoing, petitioner prays that Your Honorable Court take under advisement the questions herein presented by granting for Writ of Certiorari.

Respectfully Submitted



JACK FRISTOE
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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK FRISTOE,)

Appellant,)

v.) No. 77-3832

REYNOLDS METALS CO., et al.,) MEMORANDUM

Appellees.)

---)

Appeal from the United States District Court for the Central District of California

Before: WRIGHT and KENEDY, Circuit Judges, and HATFIELD, District Judge.*

Appellant challenges the removal of this action against his employer and labor unions to federal district court. He alleges that the employer discharged him in violation of the collective bargaining agreement and that the union breached its duty of fair representation in processing his grievance.

APPENDIX A

Moreover, he contends that his ignorance of the right to appeal the union's refusal to arbitrate his grievance excuses his failure to exhaust internal union remedies. He also asserts error in the inadvertent omission of two depositions from the record.

The district court granted the defendants motion for summary judgment, and we affirm.

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*Of the District of Montana.

FACTS

Fristoe, an employee of Reynolds Metals Co. (Reynolds), was involved in an off-premises fist-fight with his supervisor. The altercation apparently arose from a job-related dispute between them. On the basis of signed statements by two eyewitnesses who stated that Fristoe provoked the fight, Reynolds discharged him.

Fristoe asked his union steward to file a grievance over the discharge. The union took the grievance through the first three steps of the procedure but Reynolds refused to reinstate him. Because the evidence was unfavorable to Fristoe and the fight had been work-related, the union decided not to take the grievance to the fourth step, arbitration, and told Fristoe it was withdrawing the grievance.

Unaware of the appeals procedure provided by the union's constitution, Fristoe took no further action regarding his discharge until he filed a complaint in California state court.[1/]

He appeared pre se in the state proceeding. In his original complaint he alleged several causes of action including conspiracy, breach of contract, fraudulent misrepresentation, and violations of constitutional rights. He designated as defendants Reynolds and unnamed officers of the district and international unions, [2/] and Does 1-100, inclusive.

He attempted to serve the unnamed officers of Reynolds and the unions by leaving the summons and complaint with a secretary at Reynolds and with a clerical worker at the union, neither of whom was an authorized agent to accept process for any officer or for the union or company.

Reynolds, who had been properly served, filed a petition for removal to federal district court. Although the petition was filed one day late, Fristoe did not object to removal on untimeliness grounds. He contended that the complaint alleged only common law causes of action, that he sought redress from individuals, and that he was not bringing an action under Labor Management Relations Act (LMRA) S 301, 29 U.S.C. S 185. He also argued that removal was improper because the other named defendants did not join in the removal petition.

The district court judge, after extensive questioning of Fristoe as to the nature of his allegations, determined that the complaint could

be construed as alleging a breach of the collective bargaining agreement which would confer federal court jurisdiction under LMR S 301.

It granted motions of Reynolds and the unions to dismiss the complaint as to the unnamed parties and to quash service of process, finding that the complaint did not sufficiently identify the defendants. It also dismissed as to Does 1-100, concluding that joinder of Doe defendants was not permitted in federal court, and denied Fristoe's motion to remand.

The defendants then moved for summary judgment which the district court granted. It concluded that Fristoe had failed to exhaust his internal union remedies and had made no showing that the union had breached its duty of fair representation; that the record did not support any claim against Reynolds for breach of the collective bargaining agreement; and that the evidence established no participation by the International in any conduct of the union.

We face these issues:

(1) Was removal proper; and

(2) Does the record support the district court's order granting summary judgment in favor of each of the three defendants?

I

REMOVAL TO FEDERAL COURT

1, Subject Matter Jurisdiction.

Fristoe contends his original state court complaint did not confer federal subject matter jurisdiction.

Although it is true that he never mentions LMRA S 301 in the complaint, and that he stylizes causes of action in common law terms, the court questioned him carefully to determine the nature of his clains. It is apparent from the allegations in his complaint and his responses to the court's questions that Fristoe was alleging that Reynolds

wrongfully discharged him in breach of the collective bargaining agreement and that the union improperly handled his grievance with respect to this discharge.

Mere omission of reference to LMRA S 301 in the complaint does not preclude federal subject matter jurisdiction. The court's recharacterization of Fristoe's complaint as one arising under S 301 is required by federal preemption doctrines.

When principles of federal labor law are involved, they supersede state contract law or other state law theories. Republic Steel Corp. v. Maddox, 379 U.S. 650, 657 (1965); Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co., 369 U.S. 95, 102-03 (1962); Johnson v. England, 356 F. 2d 44, 48 (9th Cir.), cert. denied, 384 U.S. 961 (1966); accord, Sheeran v. General Electric Co., 593 F.2d 93, 96-97 (9th Cir. 1979).

On similar facts, the Sixth Circuit concluded:

> We cannot accept the basic premise of Avco's argument that its action is based solely upon a State created right. Section 301 of the Labor Management Relations Act, 29 U.S.C., Section 185, confers jurisdiction upon the District Court . . . to enforce collective bargaining agreement in industries affecting interstate commerce. Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed. 972 (1957), held that Federal substantive law preemptively applies in suits under Section 301 . . . .
>
> . . . .
>
> Thus, according to the findings of the Supreme Court, as enunciated in Lincoln Mills, supra, and expanded in Lucas Flour Co., supra, all rights and claims arising from a collective bargaining agreement in an industry affecting interstate commerce arise under Federal law. State law does not exist as an independent source of private rights to enforce collective bargaining contracts. While State courts may have concurrent jurisdiction, they are bound to apply Federal law. . . . The force of Federal preemption in this area of labor law cannot be avoided by failing to mention Section 301 in the complaint.

Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists and Aerospace Workers, 376 F.2d 337, 339-40 (6th Cir. 1967), aff'd, 390 U.S. 557 (1968).

Construing Fristoe's complaint to allege

a breach of the collective bargaining agreement, we conclude that the district court had subject matter jurisdiction under LMRA S 301.

2. Untimeliness of the Removal Petition.

Reynolds concedes it filed the petition for removal one day late. See 28 U.S.C. S 1446(b). It argues that this defect is not jurisdictional and that Fristoe should be estopped from raising it because he did not object until this appeal.

The statutory time limit for removal petitions is merely a formal and modal requirement and is not jurisdictional. See Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702-04 (1972); Mackay v. Uinta Development Co., 229 U.S. 173, 176-77 (1913); 1A Moor's Federal Practice and Procedure // 0.168(3.-5) (1974 ed.).

Although the time limit is mandatory and a timely objection to a late petition will defeat removal, a party may waive the defect or be estopped

from objecting to the untimeliness by sitting on his rights. See American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17 (1951); Mackay, 229 U.S. 173; Transport Indemnity Co. v. Financial Trust Co., 339 F. Supp. 405, 407 (C.D. Cal. 1972); Green v. Zuck, 133 F. Supp. 436 (S.D.N.Y. 1955).

When a case, such as this, has been removed and has been tried "on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction. . . ." Grubbs, 405 U.S. at 702.

Because the district court would have had original jurisdiction here, and we find that Fristoe has waived the untimeliness of the removal petition by failing to object on these grounds until this appeal, his point is not well taken.

3. Failure of Unions to Join in Removal Petition.

Fristoe's objection to removal on the ground that the unions did not join in the petition overlooks the fact that the unions were not named as defendants in the state court action. Their joinder would have been improper.

Even if Fristoe's objection can be read as including the failure of the unidentified "officers" of Reynolds and the unions, as well as the Doe defendants, to join in the removal petition, their joinder was unnecessary. Although the general rule is that all defendants must join in the removal petition, exceptions are recognized for those not properly served, see P. P. Farmers' Elevator Co. v. Farmers Elevator Mutual Insurance Co., 395 F.2d 546, 547-48 (7th Cir. 1968); who are nominal or formal parties, see Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen & Assistants' Local 349, 427 F. 2d 325, 326-27 (5th Cir. 1970); or who are fictitious parties (John Does), see Grigg v. Southern Pacific Co., 246 F.2d 613, 619-20 (9th Cir. 1957). See

generally, 1A Moore's // 0.168(3.-2).

The unidentified "officers," upon whom no effective service of process had been accomplished, are not proper defendants to join in the removal petition. See Perpetual Bldg. & Loan Ass'n v. Series Directors of Equitable Bldg. & Loan Ass'n, 217 F.2d 1, 6 (4th Cir. 1954). Similarly, the failure of the fictitious John Doe defendants to join in the petition does not defeat removal.

Removal to federal court was proper.

II.

SUMMARY JUDGMENT

Standard of Review.

In reviewing an order granting summary judgment, we first determine whether the opposing party has shown that a genuine issue as to any material fact exists. If, on the record, we find

that no material facts are disputed, we view the evidence in the light most favorable to the party opposing the motion and determine whether the movant is entitled to prevail as a matter of law. Hughes v. International Bhd. of Teamsters, Local 683, 554 F.2d 365, 367 (9th Cir. 1977; MGM Grand Hotel, Inc. v. Imperial Glass Co., 533 F.2d 486, 488 (9th Cir.), cert. denied sub nom. United Pacific Ins. Co. v. MGM Grand Hotel, Inc., 429 U.S. 887 (1976); Radobenko v. Automated Equipment Corp., 520 F.2d 540, 543 (9th Cir. 1975).

We may affirm an order granting summary judgment on any ground supported by the record, even if the district court based its decision on an erroneous ground. Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 682 (9th Cir.), cert. denied, 429 U.S. 940 (1976).

Summary Judgment in Favor of the District Council.

Generally, before an employee may bring

an action against an employer for breach of a collective bargaining agreement under LMRA S 301, the employee must exhaust internal union remedies. But when the "employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance," the courts will not require exhaustion of these remedies. Vaca v. Sipes, 386 U.S. 171, 186 (1967). See Czosek v. O'Mara, 397 U.S. 25, 27-28 (1970); Glover v. St. Louis - S.F. R.R. Co., 393 U.S. 324, 330-31 (1969); Retana v. Apartment, Motel, Hotel & Elevator Operators Union, Local No. 14, AFL-CIO, 453 F.2d 1018, 1025-26 (9th Cir. 1972).

A union breaches its statutory duty of fair representation when the "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. at 190. The mere fact that a union refuses to arbitrate the grievance, however, does not establish a breach of this duty. Id. at 192.

Fristoe, conceding that he failed to exhaust his union remedies, contends that he was ignorant of the appeals procedure and that the union was remiss in failing to inform him of the procedure once it decided not to process his grievance. He also contends that the union was lax in investigation the circumstances of his discharge.

An employee's ignorance of the appeals procedure does not generally excuse the failure to exhaust internal union remedies, even if the union failed to inform him of the possibility.

In Newgent v. Modine Mfg. Co., 495 F.2d. 919 (7th Cir. 1974), the court concluded that:

> (T)he exhaustion of union remedies is mandatory . . . and there is no question that the Union remedies are in fact fair and adequate and were freely available to Newgent. By becoming a member of the Union Newgent was contractually obligated to exhaust union remedies before resorting to a court action . . . Necessarily implied in this obligation is the duty to become aware of the nature and availability of

> union remedies. Newgent was not "justified in . . . relying on a statement by an officer that there was nothing he could do."

Id. at 927-28 (citations omitted). Accord, Kowalski v. Wisconsin Steel Works of Int'l Harvester Co., 433 F. Supp. 314 (N.D. Ill. 1977); Brookins v. Chrysler Corp., Dodge Main Division, 381 F. Supp. 563, 566 (E.D. Mich. 1974); cf. Dorn v. Meyers Parking System, 195 F. Supp. 779 (E.D. Pa. 1975) (it is the union's burden to present facts showing that the procedures are generally known to union membership).[3/]

There is no indication in this record that the union's representation through the three steps of the grievance procedure was anything but diligent. Fristoe's bare assertion of inadequate investigation, absent any showing that the union failed to uncover valuable evidence, is insufficient to defeat summary judgment.

Absent any showing of arbitrariness or hostility on the part of the union, Fristoe has

not demonstrated a breach of the duty of fair representation.

Summary Judgment in Favor of Reynolds.

Because Fristoe has failed to show any justifiable excuse for failing to exhaust his internal union remedies, he is not entitled to pursue his claim against Reynolds in the courts. See Vaca v. Sipes, 386 U.S. at 186; Buzzard v. Local Lodge 1040 Ass'n of Machinists and Aerospace Workers, 480 F.2d 35, 41-42 (9th Cir 1973). Dismissal of the complaint as to it was proper. We need not reach the merits of Fristoe's breach of the collective bargaining agreement claim against Reynolds.

Summary Judgment in Favor of the International.

To show liability on the part of the International for the conduct of the local and district council, Fristoe would have to establish

the existence of an agency relationship. Applying the general principles of the law of agency, we find that no such relationship has been shown.

Even assuming an agency relationship did exist, the International is not liable because the local and district council did not breach their duty of fair representation.

Absence of Two Depositions in the Record.

Appellant has failed to show how he may have been prejudiced by appellees' omission of two depositions in the record prior to summary judgment. Absent a showing of prejudice, we find this error harmless.

AFFIRMED.

FOOTNOTES

1/ The Constitution and Laws of the International Printing and Graphic Communications Union provides that a decision of a subordinate union may be appealed to the President of the International Union, that the President's decision may be appealed to the Board of Directors, and that the Board's decision may be appealed to the next convention of the International Union, whose decision is final.

2/ Fristoe was a member of Printing Specialties and Paper Products Union, District Council No. 2, Local Union No.708. The international affiliate, which he incorrectly designated as the International Printing Pressmen and Assistant Union, AFL-CIO, is, in fact, the International Printing Graphic Communications Union, AFL-CIO.

3/ Although we suggested in Retana that an employee who was ignorant of internal union remedies may have been justified in failing to exhaust these remedies because she spoke virtually no English, had never seen the union's constitution or by-laws, and the union had failed to explain her rights in Spanish, 453 F.2d at 1027, Fristoe does not present similar equities.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JACK FRISTOE, Plaintiff, v. REYNOLDS METALS COMPANY: PRINTING SPECIALTIES AND PAPER PRODUCTS UNION, DISTRICT COUNCIL NO. 2, LOCAL UNION NO. 708; INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS UNION, AFL-CIO., Defendants.	No. CV 74-2829-FW MEMORANDUM OF DECISION

The Motions of Defendants Reynolds Metals Company, hereafter referred to as the Company, Printing Specialties and Paper Products Union, District Council No. 2 and its Local Union, No. 708, hereafter referred to as the Union, and International Printing and Graphic Communications Union, AFL-CIO, incorrectly named in the complaint as International Printing Pressmen and Assistants Union, AFL-CIO, hereafter referred to as the International, for Summary Judgment came

on for hearing. Following oral argument, the matter was submitted for decision. After considering the arguments, both oral and written, and after considering all documents on file herein, it is the opinion of this Court that the motions should be granted.

Plaintiff had been an employee of Defendant Company. He was also a member of the bargaining unit represented by the Union. Printing Specialties and Paper Products Union, District Council No. 2 and its local are affiliated with the International. In July, 1973, Plaintiff was discharged by the Company. He submitted a grievance because of his discharge to the union of which he was a member.

Step Two and Step Three grievance hearings, as provided in the collective bargaining agreement, were held by Defendant Union on Plaintiff's behalf. At Step Two, the Company met with the Shop Committee to consider Plaintiff's grievance. When the Company refused to reinstate

Plaintiff, a Step Three meeting was held between the Union's representative, the Shop Committee and the Company. The grievance was found thereafter to be non-meritorious by the Union and Plaintiff was denied a hearing before the arbitration board. Plaintiff did not appeal, to the President of the International, the Union's decision not to refer the grievance to arbitration as provided in Step Four. Plaintiff instead brought the present action for breach by the Company of the collective bargaining agreement and failure of the Union to fairly represent him. However, it has been shown in the record in this case the Company did not breach the collective bargaining agreement.

Plaintiff failed to exhaust his intra-union remedies by not appealing the Union's decision at the Step Three meeting before bringing this action. The constitution of the International gives Plaintiff the right to appeal the Union's determination that his grievance was non-meritious. Article XX provides for an appeal from a decision of the Union to the President of the

International. An appeal can be made from the President to the Board of Directors of the International and from there to the next convention of the International, whose decision shall be final. The duty to pursue intra-union remedies exists unless Plaintiff can establish that the union has breached its duty of fair representation. Vaca v. Sipes, 386 U.S. 171 (1966). Plaintiff has made no such showing in this case.

Finally, there have been no facts established which are adequate to implicate the International in any conduct of the Union. Although the Union is affiliated with the International, it appears the International does not participate in the negotiation or administration of the Union's collective bargaining agreement.

There being no dispute as to any material facts, this is an appropriate case for summary judgment. The foregoing constitutes the summary of undisputed facts and conclusions of law of the court.

No judgment shall be entered until the Court has signed and caused to be filed its formal judgment.

DATED this 28 day of September, 1977

FRANCIS C. WHELAN
UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, and not a party to the within action. On October 29, 1979, I served three copies of the attached

PETITION FOR WRIT OF CERTIORARI

on the interested parties in said action by placing said copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the U.S. mail in the City of Westminster, State of California addressed as follows:

Henry R. Fenton, Esq. of
Levy & Goldman
3550 Wilshire Bl. Ste. 1020
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Los Angeles, Ca. 90036

Robert F. Walker, Esq. of
Paul, Hastings, Jonofsky
& Walker
555 S. Flower St. 22nd Fl.
Los Angeles, Ca. 90071

and there is regular communication by mail between the place of mailing and the place so addressed.

I hereby declare under penalty of perjury that the foregoing is true.

Executed on October 29, 1979 at Westminster, California.

Deborah A. Blasca

FILED
DEC 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-717

JACK FRISTOE,

Petitioner,

vs.

REYNOLDS METALS COMPANY, a California corporation; PRINTING SPECIALTIES AND PAPER PRODUCTS UNION, DISTRICT COUNCIL NO. 2, Local Union No. 708, an unincorporated association; INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS UNION, AFL-CIO, an unincorporated association,

Respondents.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respondent Reynolds Metals Company respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the Court of Appeals for the Ninth Circuit filed August 8, 1979, in the above-entitled case.

Questions Presented.

Petitioner is dissatisfied with the results below and therefore complains to this Court. While difficult to discern, it appears that the petition presents the following questions:

1. Whether the Ninth Circuit's decision, which holds that it is not a breach of the duty of fair representation to refuse in good faith to arbitrate an employee's grievance arising from an off-duty but job-related fight with supervision, conflicts with the decision of the Court of Appeals for the Fourth Circuit in *Griffin v. UAW*, 469 F.2d 181 (4th Cir. 1972).
2. Whether the Ninth Circuit's decision conflicts with any applicable decisions of this Court concerning joinder in removal petitions, a union's duty to investigate grievances and the omission of depositions from the record.

Statement of the Case.

On July 14, 1973, Jack Fristoe (Petitioner) received a written warning from his supervisor for failing to perform his job properly as an employee of Reynolds Metals Company (Respondent). At the end of his workshift, Petitioner drove to a bar located in the opposite direction from that normally taken to travel to his home and waited for his supervisor to arrive. When the supervisor, accompanied by two friends, arrived at the bar, Petitioner confronted him concerning his "work at the plant" and a fight ensued during which Petitioner struck his supervisor with his fists. Respondent, following an investigation, discharged Petitioner from its employ and Petitioner grieved pursuant to the exclusive grievance and arbitration procedure in the collective bargaining agreement between Respondent and Printing Specialties and Paper Products Union, District Council No. 2, Local Union 708 (Unions).

Although the Unions pressed Petitioner's grievance through the first three steps of the grievance and arbitration procedure, the Unions, after learning that the only two eyewitnesses to the fight had stated that Petitioner was the aggressor and that the fight was demonstrably work related, decided not to seek arbitration of the grievance.

In August 1974 Petitioner, without first attempting to exhaust the remedies provided under the Unions' constitution, filed suit against Respondent and certain unspecified or fictitious defendants in the California Superior Court, which suit Respondent removed to the United States District Court for the Central District of California. Petitioner eventually added the Unions as defendants and alleged that Respondent had breached the collective bargaining agreement by discharging him and that he need not exhaust his contractual remedy because the Unions had breached their duty to fairly represent him in connection with his grievance. The District Court, finding Petitioner's allegations to be without merit, granted summary judgment for Respondent and the Unions in September 1977.

The Court of Appeals for the Ninth Circuit affirmed, finding that the suit had been properly removed, that Petitioner had not satisfied the requirement to exhaust his contractual remedy as he had not demonstrated a breach of the duty of fair representation, that Petitioner had not exhausted his internal union remedies and that Petitioner had not shown any prejudice by the omission of two depositions from the record. Petitioner now renews his previously rejected arguments in this Court.

REASONS FOR DENYING THE WRIT.

The Ninth Circuit's decision, rendered on an uncomplicated factual record and pursuant to well-established precedents, raises no conflicts with the decisions of other circuits or with the decisions of this Court. The petition is patently specious in that it contends, in effect, that this Court should ignore its earlier decisions and determine, for this case alone, that the Unions breached their duty of fair representation by refusing in good faith to pursue Petitioner's grievance to arbitration.

I

The Duty of Fair Representation Does Not Require That Each Grievance Be Arbitrated.

This Court long ago recognized that contractual grievance and arbitration procedures are usually controlled by the unions and employers who devised them and therefore are potentially subject to abuse. *Vaca v. Sipes,* 386 U.S. 171, 185 (1967). At the same time the Court was quick to conclude that "a union does not breach its duty of fair representation . . . merely because it settled the grievance short of arbitration." *Id.* at 192. The Court stated that a grievance and arbitration procedure can only operate successfully if a union can settle non-meritorious grievances short of the costly and time-consuming step of arbitration. Indeed, "if the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined," and it is doubtful that employers and unions "would continue to provide for detailed grievance and arbitration procedures of the kind encouraged by [Labor-Management Relations Act] §203(d)." *Id.* at 191-92.

In recognition of the important policies in favor of maintaining control of grievance and arbitration procedures with the parties to collective bargaining agreements and in recognition of the need to protect the individual employee from a union's bad faith refusal to pursue his grievance, this Court determined that a union breaches its duty of fair representation whenever its conduct towards a member of the collective bargaining unit "is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. at 190.

That test is exactly what the Ninth Circuit applied to the facts herein when it concluded that there had been no breach of the duty of fair representation because there had been no "showing of arbitrariness or hostility on the part of the union" (Petition for Writ of Certiorari, pp. 30, 32-33). Petitioner ignores the facts that the record overwhelmingly establishes that his grievance was without merit and that the Unions had good reasons to refuse to arbitrate herein and, as a practical matter, argues that he should be given special treatment by this Court despite his failure to establish arbitrary or bad faith union conduct. What Petitioner does, then, is underscore the wisdom of the *Vaca* standard, for Petitioner has consistently been unable realistically to evaluate his grievance.

II

No Conflict Exists Between the Ninth Circuit's Decision Herein and the Decision of the Fourth Circuit.

Petitioner suggests that there is a conflict between the decision in *Griffin v. UAW*, 469 F.2d 181 (4th Cir. 1972) and the Ninth Circuit's decision here. Specifically, Petitioner states that *Griffin* holds that a union breaches its duty of fair representation when it fails to pursue to arbitration a grievance arising from the discharge of an employee engaged in an off-duty fight with a supervisor (Petition for Writ of Certiorari, pp. 3-4, 15).

Petitioner has, at best, misread *Griffin*. There the employer had discharged an employee for fighting with his supervisor after working hours, but the record does not establish that the fight was job related and the Fourth Circuit does not so find. Rather, that court, in affirming a jury verdict for the employee, found that there was evidence from which the jury could find that the union acted "arbitrarily" by presenting the grievance for resolution to the supervisor who participated in the fight and that the union acted in "bad faith" because its officials failed to pursue the employee's grievance as a result of their personal friendships with the supervisor. That court, then, applied the test of *Vaca v. Sipes*, 386 U.S. at 190, to the facts of that case as the jury could reasonably view those facts.

Griffin does not, then, conflict with the decision herein because both courts have applied the same legal standard to the peculiar facts presented, because there is no holding there that the fight was job related, as is the case here, and because there is a holding there that the jury could determine that the union

acted arbitrarily and in bad faith based on facts that do not exist here. Put differently, the *Griffin* court applied the test developed in *Vaca* to those peculiar facts, as a jury could view them, and reached one conclusion, while the Ninth Circuit applied the same test to these facts and properly reached a different conclusion.

III

The Ninth Circuit Has Not Failed to Follow Any Decisions of This Court.

Although the petition herein is ambiguous, Petitioner apparently contends that the Ninth Circuit did not properly apply several decisions of this Court to the facts. Even if this contention were true, such a failure would not establish a conflict in decisions, entitling Petitioner to a review in this Court. However, that error does not exist for the reasons set forth below.

A. The Removal Was Proper.

Petitioner—while renewing his contention that all "defendants" should have joincd in the removal petition despite the fact that they had not been named in the state court action, were unserved and were nominal or fictitious parties—argues for the first time here that the Ninth Circuit, in rejecting Petitioner's removal argument, did not consider that the District Court had an obligation to remand the action to the state court on its own motion when it became aware of the "joinder" defect (Petition for Writ of Certiorari, pp. 9-10). Aside from the facts that this argument was not made before the Ninth Circuit and could not in any case establish a conflict in decisions, the Ninth Circuit specifically found that no joinder defect existed based on authority which has not been brought

into question by the petition. As there is no joinder defect, the District Court had no obligation to remand on its own motion.

B. There Has Been No Breach of the Duty of Fair Representation and Summary Judgment Was Proper.

Petitioner suggests that the Unions' investigation of his grievance was inadequate under *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) because he was not personally interviewed by the Unions' business agent while such agent did review the written statements of two witnesses to the fight (Petition for Writ of Certiorari, pp. 11-12). No decisional conflict is possible because the decision of this Court in *Hines* determined an issue of employer liability when a union had breached its duty of fair representation. Moreover, in the Sixth Circuit decision there (*Hines v. Local 377, Teamsters Union*, 506 F.2d 1153 (6th Cir. 1974)) the court held that a union's grievance investigation was inadequate because evidence favorable to the employees existed, but the union made no attempt to obtain it and that failure occurred in the context of union hostility towards the employees. Here Petitioner has completely failed to establish that additional investigation by the Unions would have changed the result, that the Unions acted out of hostility towards the Petitioner or that a decision of this Court has been ignored.

Petitioner is again arguing that the Court should, for his particular case, ignore the test it wisely developed in *Vaca* and find a breach of the duty of fair representation simply because the Unions refused to pursue a grievance arising from an off-duty fight to arbitration without any evidence that the Unions acted arbitrarily, discriminatorily or in bad faith. Petitioner's request for such special treatment deserves no further consideration.

C. Petitioner Has Not Been Denied Due Process.

Finally, Petitioner asserts once again that he has been denied due process because two depositions were not before the District Court when it rendered summary judgment for Respondent and the Unions (Petition for Writ of Certiorari, pp. 13-14). Again, as the Ninth Circuit expressly found, Petitioner makes no showing that he has been prejudiced by such omission and his reliance upon *United States v. Throckmorton*, 98 U.S. 61 (1878), which provides guidance in cases where a judgment has been obtained through fraud, is totally misplaced.

Conclusion.

Since Petitioner has established no conflict between the Ninth Circuit's decision herein and the decision of any other court of appeals or this Court, but rather has asked for special treatment inconsistent with existing decisions, Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Dated: December 4, 1979.

Respectfully submitted,

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